

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 22, 2002 Session

ANGELA HODGES, ET AL. v. STATE OF TENNESSEE

**A Direct Appeal from the Claims Commission
No. 20-000-587 W. R. Baker, Commissioner**

No. W2001-01026-COA-R3-CV - Filed February 26, 2002

This is an appeal of a decision of the Tennessee Claims Commission. Claimant's complaint seeks damages for her husband's death by suicide after he had been treated by a state employed psychologist. Claimant alleges that the psychologist was negligent in his care and treatment of the deceased which resulted in the suicide. The Claims Commissioner dismissed the claim for lack of jurisdiction because it was not a medical malpractice claim within the meaning of T.C.A. § 9-8-307 (a)(1)(D). Claimant has appealed. We reverse.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Claims Commission Reversed and Remanded

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Robert D. Flynn, Marc A. Sorin, Memphis, For Appellants, Angela Hodges, et al.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, Meredith Devault, Senior Counsel, for Appellee, State of Tennessee

OPINION

On October 5, 1999, claimant, Angela Hodges, individually and on behalf of her minor children, filed a claim for damages with the Division of Claims. Subsequently, the Division of Claims transferred the claim to the Claims Commission pursuant to T.C.A. § 9-8-402 (c). The claim asserts that on October 8, 1998, claimant's decedent, Anthony Hodges, was transported to the emergency room at the Regional Medical Center in Memphis, Tennessee following his attempted suicide. He was treated at the hospital by Dr. James W. Buechele, a psychologist and employee of the State of Tennessee. The complaint alleges that the psychologist committed malpractice by failing to properly diagnose, evaluate, and treat Anthony Hodges and by failing to involuntarily commit him pursuant to T.C.A. § 33-6-103. The complaint further alleges that less than twelve hours after Dr.

Buechele discharged Anthony Hodges from the hospital, Anthony Hodges committed suicide, and claimant seeks damages for his wrongful death.

The State of Tennessee filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Tenn.R.Civ.P. 12.02 (1)¹. On March 28, 2001, the Claims Commission filed its order dismissing the claim. The order states as follows:

The State has filed a motion to dismiss; the claimant has filed a response to that motion, and the state has replied to that response. Later the claimant filed an affidavit as a supplemental exhibit to its response to this pending motion, and the State has objected to that affidavit and has filed a motion to strike it.

The issue is the application to the facts in this claim of T. C. A. § 9-8-307 (a) 91) (D). In April 1998 the General Assembly changed the wording of that statute. Until that time the State has been liable for “Professional malpractice” by State employees; but the new wording of the statute makes the State’s prospective liability narrower so that the State is only liable for “legal or medical malpractice” by State employees. The particular issue in this claim is whether this amended statute applies to a professional/client relationship between this claimant’s late husband and a State employee who is a licensed clinical psychologist – in other words whether the psychologist’s actions in the context of the statute in question constitute the practice of medicine.

The State’s motion has to be granted. There is a plain, simple, generally recognized distinction between the practice of medicine and the practice of psychology. Each may be practiced in a hospital emergency room. Each properly involves the use of the title “Doctor” (in reference to an M. D. Degree in one case, and to a Ph. D. degree in the other). Even presuming that the nurse’s affidavit submitted by the claimant is admissible, this affidavit deals with the difference between the practice of medicine and the practice of nursing – it really does not consider any relationship between medical practice and psychology – and so it is not pertinent to the State’s pending motion (in fact this affidavit makes the distinction, “Nurses do not diagnose medical or psychological conditions...”).

¹ The proceedings before the Tennessee Claims Commission “shall be conducted pursuant to rules of the Tennessee Rules of Civil Procedure where applicable and otherwise pursuant to rules and regulations promulgated by the commission.” T.C.A. § 9-8-403 (1999).

The real problem in this claim is the legislature's narrowing this Commission's jurisdiction. From the claimant's exhibits it appears that this narrowing of jurisdiction was done by the legislature, at the request of the State Treasurer's office, with no understanding of what effect the language of the legislation would have. Certainly nobody in either the General Assembly nor the State Treasurer's office had any contact with the Commissioner who is writing this opinion about this change in the Commission's jurisdiction, either before or after it was accomplished. Nevertheless the law is clear: sovereign immunity lets the legislature narrow or widen Claims Commission jurisdiction as it sees fit. And the legislature has seen fit, as of April 1998, to use language that excludes questions about the practice of psychology from this Commission's jurisdiction. The only remedy is in the hands of the legislature.

The State's motion to strike the claimant's affidavit is denied. The State's motion to dismiss is granted. This claim is respectfully dismissed.

Claimant has appealed, and the only issue for review is whether the claim involved is "medical malpractice" as required to confer jurisdiction on the Claims Commission pursuant to T.C.A. § 9-8-307 (a)(1)(D).

In *Northland Insurance Co. v. State*, 33 S.W.3d 727 (Tenn. 2000), our Supreme Court said:

Subject matter jurisdiction involves the nature of the cause of action and the relief sought, and can only be conferred on a court by constitutional or legislative act. *See Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn.Ct.App. 1989). Since a determination of whether subject matter jurisdiction exists is a question of law, our standard of review is de novo, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

Id. at 729.

Article I, section 17 of the Constitution of the State of Tennessee provides in pertinent part: "Suits may be brought against the State in such a manner and in such courts as the Legislature may by law direct." Statutes, passed by the Legislature under the authority of this constitutional provision, "permitting suits against the state, being in derogation of the sovereign's exemption from suits, must be strictly construed. 59 C.J. 303." *State v. Cook*, 106 S.W.2d 858, 860 (Tenn. 1937)). The determination of the issue before us requires an examination and interpretation of the statute

granting jurisdiction to the Claims Commission. T.C.A. § 9-8-307 (Supp. 2001) provides in pertinent part:

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:

* * *

(D) Legal or medical malpractice by a state employee; provided, that the state employee has a professional/client relationship with the claimant;

* * *

(3) . . . It is the intent of the general assembly that the jurisdiction of the claims commission be liberally construed to implement the remedial purposes of this legislation. . . .

Claimant asserts that the “plain, clear, and unmistakable language” of the statute clearly includes acts and omissions of Dr. Buechele. Claimant argues that Dr. Buechele made a medical diagnosis following the guidelines of the American Psychiatric Association and that he was acting in a medical capacity when he undertook to treat the patient in the hospital emergency room. She argues that Dr. Buechele was performing the same function as a psychiatrist, and that his acts and omissions fall within the jurisdiction of the Commission as authorized by the statute. She also points out that our Supreme Court recognized that a psychologist is subject to suit pursuant to the Medical Malpractice Act when it applied the statute of limitations contained in that Act to bar a suit against a psychologist. *See Roe v. Jefferson*, 875 S.W.2d 653 (Tenn. 1994).

The State, on the other hand, contends that there is no specific authorization for a suit against a psychologist, and the intent of the Legislature is brought home by its amendment of the statute which had previously allowed claims against the State for professional malpractice, to now limit the claims to medical or legal malpractice. The State further contends that T.C.A. § 63-11-204 (1997) evidences the recognition by the Legislature that services provided by psychologists are nonmedical in nature. The statute provides:

63-11-204. Restrictions on methods of treatment

(a) Nothing in §§ 63-11-201 -- 63-11-203 shall be construed as permitting the use of those forms of psychotherapy which involve the administration or prescription of drugs or electroshock or in any way infringing upon the practice of medicine as defined in the laws of this state.

(b) The psychologist or psychological examiner or senior psychological examiner or certified psychological assistant who engages in psychotherapy must establish and maintain effective intercommunication with a psychologically-oriented physician, usually a psychiatrist, to make provision for the diagnosis and treatment of medical problems by a physician with an unlimited license to practice the healing arts in this state.

(c) A psychologist or psychological examiner or senior psychological examiner or certified psychological assistant must not attempt to diagnose, prescribe for, treat or advise a client with reference to problems or complaints falling outside the boundaries of psychological practice.

Understandably, we have found no case casting light on the interpretation of the precise language of the statute in question. The primary purpose in construing a statute is to ascertain and give effect to the intention and the purpose of the Legislature. Where the language of the statute does not speak to the precise issue, the court should give consideration to the purpose, objective, and spirit behind the legislation. *See Lipscomb v. Doe*, 32 S.W.3d 840 (Tenn. 2000). Obviously, the purpose of the Legislature in deleting the right to a claim against the State for “professional malpractice” and replacing that provision with a claim for “legal or medical malpractice” was to limit to some extent the broad gamut of professional malpractice claims. The grant of jurisdiction to the Claims Commission for claims of medical malpractice by a state employee require that there be a professional/client relationship with the claimant. This indicates an intention by the Legislature to include only those professions in the medical field that establish a professional/client relationship for the purpose of rendering care and treatment to the claimant. In this context, it is difficult to understand why the Legislature would differentiate between the exact same diagnosis and treatment by a psychologist on the one hand and a psychiatrist on the other.

The practice of psychologists set out in T.C.A. 63-11-203 (1997) states as follows:

63-11-203. Practice of psychologist

(a) "Practice of psychologist" means the observation, description,

evaluation, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures, for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health. Practice of psychologist includes, but is not limited to, psychological testing and the evaluation or assessment of personal characteristics, such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; psychological diagnosis and treatment of mental, emotional and nervous disorders or disabilities, alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological aspects of physical illness, accident, injury, or disability; case management and utilization review of psychological services; and psychoeducational evaluation, therapy, remediation, and consultation. Psychological services may be rendered to individuals, families, groups, and the public. "Practice of psychologist" is construed within the meaning of this definition without regard to whether payment is received for services rendered.

(b) A person represents that person to be a psychologist if that person uses any title or description of services incorporating the words "psychology," "psychological," or "psychologist," or if such person possesses expert qualification in any area of psychology, or if that person offers to the public or renders to individuals or to groups of individuals services defined as the practice of psychology in this chapter.

Significantly, the practice of psychologists specifically includes “diagnosis and treatment of mental, emotional, and nervous disorders or disability, alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological aspects of physical illness, accident, injury, or disability.”

T.C.A. § 63-11-213 (1997) provides:

63-11-213. Privileged communications

For the purpose of this chapter, the confidential relations and communications between a licensed psychologist or psychological examiner or senior psychological examiner or certified

psychological assistant and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

It is apparent from this statute that the diagnosing and treating psychologist establishes a professional/client relationship.

The State asserts, and rightfully so, that suits against the State are in derogation of the common law, and statutes purporting to permit these suits should be strictly construed. *See State ex rel. Allen v. Cook*, 171 Tenn. 605, 106 S.W.2d 858 (1937); *Stokes v. University of Tennessee*, 737 S.W.2d 545 (Tenn. Ct. App. 1987), *cert. denied* 485 U.S. 935 (1988). However, we must be mindful of the provision of the Claims Commission jurisdiction statute “that it is the intent of the general assembly that the jurisdiction of the Claims Commission be liberally construed to implement the remedial purposes of this legislation.” T.C.A. 9-8-307 (a)(3).

In *Hembree v. State*, 925 S.W.2d 513 (Tenn. 1996), our Supreme Court was called upon to interpret the jurisdiction granted to the Claims Commission to consider claims against the State involving “negligent care, custody, and control of persons.” T.C.A. § 9-8-307 (a)(1)(E). The State contended that the claim based upon the negligent release of a patient from a state mental hospital did not fall into this category, but our Supreme Court held that the “care, custody, and control” could be read to cover the release of the patient. *Id.* at 517-18.

In *Northland Insurance Co. v. State*, 33 S.W.2d 727 (Tenn. 2000), our Supreme Court noted that “*Hembree* illustrates that the jurisdictional categories in Section 9-8-307 should not be interpreted narrowly. A liberal construction of an existing category, however, is a different proposition than a construction creating a new category.” *Id.* at 730.

In *Stewart v. State*, 33 S.W.3d 785 (Tenn. 2000), our Supreme Court, in deciding another issue concerning the Claims Commission jurisdiction, stated:

[W]hen deciding whether a claim is within the proper statutory scope of the Commission’s jurisdiction to hear and decide claims against the State of Tennessee, we will give a liberal construction in favor of jurisdiction, but only so long as (1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the “most favorable view in support of the petitioner’s claim” is not clearly contrary to the statutory language used by the General Assembly. *Cf. Northland Ins. Co. v. State*, 33 S.W.3d 727, 730 (Tenn. 2000) (“The statute’s liberal construction mandate allows courts to more broadly and expansively interpret the concepts and provisions within its text.”). Furthermore, because issues of statutory construction are questions of law, *see Wakefield v. Crawley*, 6 S.W.3d 442, 445 (Tenn. 1999); *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 599 (Tenn. 1999), we review the issues involving the jurisdiction of the Claims

Commission *de novo* without any presumption that the legal determinations of the commissioner were correct. *See Northland Ins. Co.*, 33 S.W.3d at 729; *Ardis Mobile Home Park v. State*, 910 S.W.2d 863, 865 (Tenn. Ct. App. 1995).

Id. at 791.

In the instant case, Dr. Buechele was furnished as the diagnosing and treating medical authority and was acting within the realm of his licensure when he diagnosed and treated claimant's decedent. Under these circumstances and considering the language of the jurisdictional grant to the Claims Commission, we find that Dr. Buechele's activities in this regard, if negligent, could constitute medical malpractice.

Accordingly, the judgment of the Claims Commission dismissing claimant's claim is reversed, and the case is remanded to the Claims Commission for such further proceedings as may be necessary. Costs of the appeal are assessed against the State of Tennessee.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.